## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTH METRO HUMAN SERVICES,

and Case 18-RC-17754

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES COUNCIL 5

## DECISION AND DIRECTION OF SECOND ELECTION

The National Labor Relations Board, by a three-member panel, has considered determinative challenges to an election conducted April 28, 2011,<sup>1</sup> and the hearing officer's report (attached in pertinent part as Appendix A) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 70 for and 71 against the Petitioner, with 9 challenged ballots, a sufficient number to affect the election results.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings<sup>2</sup> and recommendations<sup>3</sup> only to the extent consistent with this Decision and Direction of Second Election.

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<sup>&</sup>lt;sup>1</sup> All dates referenced hereafter are in 2011.

<sup>&</sup>lt;sup>2</sup> The parties have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions

The hearing officer recommended sustaining the Employer's challenges to the ballots of four on-call employees, finding that those employees are not included in the stipulated unit of all full-time and regular part-time professional employees. The hearing officer also recommended sustaining the Petitioner's challenges to the ballots of two mental health counselors with the job title of "MHC II," finding that the counselors are not professional employees and, therefore, are not included in the unit.

For the reasons stated by the hearing officer, we agree that the MHC IIs are not professionals within the meaning of Section 2(12) of the Act. We further note, however, that the record establishes that a potentially decisive number of MHC IIs, none of whom were eligible, voted in this election without challenge. Their ballots were commingled and counted with those of eligible voters.<sup>4</sup> Consequently, it cannot be said that a majority of the professional employees voted for inclusion in the unit as required by Section 9(b)(1) of the Act. While there was no specific objection on this basis, and while the parties stipulated prior to the election to the inclusion of the MHC IIs in a professional unit, the above finding of failure to conform to a clear statutory requirement, based on evidence properly adduced at the post-election hearing, requires that the

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unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

<sup>&</sup>lt;sup>3</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the parties' objections to the election.

<sup>&</sup>lt;sup>4</sup> Of at least 15 MHC IIs who voted in the election, the Petitioner challenged the eligibility of only 2.

election results be set aside.<sup>5</sup> Accordingly, we set aside the results and order a new election. <sup>6</sup>

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the

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<sup>&</sup>lt;sup>5</sup> See *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999).

<sup>&</sup>lt;sup>6</sup> As a result, we find it unnecessary to resolve the parties' challenges to specific ballots, including challenges to the ballots cast by the four on-call employees. We nevertheless specifically disavow the hearing officer's finding that on-call employees should be excluded from the unit because the on-call job classification is not specifically included in the stipulated unit description. Where, as here, the express terms of a stipulation neither include nor exclude on-call employees, it is necessary to consider the similarity of the work performed by the on-call employees to the work performed by the other employees in the unit, as well as the regularity and continuity of the on-call employees' employment, in determining whether those employees should be included in the unit. See, e.g., Trump Taj Mahal Casino, 306 NLRB 294, 295 (1992), enfd. 2 F.3d 35 (3d Cir. 1993). With regard to the regularity of the on-call employees' employment, the Board has held that, absent special circumstances, an employee will be regarded as a regular part-time employee if he averages 4 or more hours per week during the quarter prior to the election eligibility date. *Davison-Paxon Co.*, 185 NLRB 21 (1970).

strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by American Federation of State, County, and Municipal Employees Council 5.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C., September 19, 2012.

	Mark Gaston Pearce,	Chairman	
	Brian E. Hayes,	Member	
	Richard F. Griffin, Jr.,	Member	
(SEAL)	NATIONAL LABOR RELAT	NATIONAL LABOR RELATIONS BOARD	